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No. 88-1708

In the Supreme Court of the United States

OCTOBER TERM, 1989

SPAWR OPTICAL RESEARCH, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioners seek further review of the denial of their motion, under 28 U.S.C. 2255, to vacate the sentences imposed upon their convictions for exporting laser mirrors to the Soviet Union without a validated export license. Petitioners contend that their counsel at trial were ineffective because they failed to develop evidence that their laser mirrors were not on the portion of the Commodity Control List—the list promulgated by the Secretary of Commerce of items and categories of items whose exportation is subject to regulation—that specifies goods for which a validated export license is required and that the government withheld exculpatory evidence and misled the trial court on this point. The question presented is:

Whether any evidence that the prosecution allegedly withheld or that petitioners' trial counsel failed to present related to a triable issue of fact.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 864 F.2d 1467. The opinions of the district court denying petitioners' Section 2255 motion and petitioners' motion for reconsideration of that denial (Pet. App. 17a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1988. A petition for rehearing was denied on February 23, 1989 (Pet. App. 27a). The petition for a writ of certiorari was filed on April 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1981, following a jury trial in the United States District Court for the Central District of California, petitioners Spawr Optical Research, Inc., and Frances Spawr were convicted of misrepresenting shipment values in Shipper's Export Declarations submitted to the United States Customs Service, in violation of 18 U.S.C. 1001 (Counts 1-6). Spawr Optical was also convicted of unlawfully exporting laser mirrors to West Germany knowing that they would be transshipped to the Soviet Union, in violation of 50 U.S.C. App. 2405(b) (1976) (Counts 7-9). Finally, all three petitioners were convicted of conspiring to export laser mirrors without the requisite validated export license, in violation of 18 U.S.C. 371 (Count 10), and unlawfully exporting laser mirrors to Switzerland knowing that they would be transshipped to the Soviet Union, in violation of 50 U.S.C. App. 5(b) (1976), Exec. Order No. 11,940, 3 C.F.R. 150 (1977), and applicable export regulations (Counts 11-14).[1] Spawr Optical was sentenced to fines totalling $100,000; Walter and Frances Spawr were sentenced to terms of imprisonment that were suspended in favor of probation, with the exception of a six-month term served by Walter Spawr. On appeal, the court of appeals affirmed. 685 F.2d 1076, 1078 n.1 (1982). This Court denied certiorari. 461 U.S. 905 (1983).

In 1985, petitioners filed a motion under 28 U.S.C. 2255 to vacate their sentences. The district court denied that

[1] Counts 11-14 were prosecuted under the Trading with the Enemy Act (50 U.S.C. App. 5(b) (1976)) and Exec. Order No. 11,940 because the violations charged on those counts occurred in February 1977, after the Export Administration Act of 1969, 50 U.S.C. App. 2401 *et seq.* (1976), had lapsed. The violations alleged in Counts 7-9 predated the lapse of the Export Administration Act and were prosecuted under that statute. For purposes of this case, the difference in the statutory basis for various counts is immaterial.

motion and petitioners' motion for reconsideration (Pet. App. 17a-26a). The court of appeals affirmed, with Judge Pregerson dissenting (Pet. App. 1a-16a).

1. The Export Administration Act of 1969, 50 U.S.C. App. 2403(b) (1976), authorized the President to issue regulations prohibiting or curtailing the exportation of goods in order to effectuate various policies enumerated in the Act. Under 50 U.S.C. App. 2407 (1976), the "functions exercised under" the Act were excluded from those provisions of the Administrative Procedure Act that customarily provide judicial review of agency action. The President delegated his authority to the Secretary of Commerce (Exec. Order No. 11,533, 3 C.F.R. 932 (1966-1970 comp.)), and the Secretary promulgated regulations that, *inter alia,* prohibited exports of certain commodities identified on a Commodity Control List to particular countries, except pursuant to a validated license. See 15 C.F.R. Pt. 372 (1980).

The Commodity Control List, which the Secretary has issued and amended from time to time, specifies the commodities that are subject to export controls and indicates the licensing requirements applicable to each.[2] During the

[2] The Control List includes *any* good that is subject to regulation by the Department of Commerce. Because this country prohibits exports of virtually all commodities to a handful of countries such as Cuba, the list is very broad. Most exportations of goods on the list are authorized by general licenses—licenses not requiring individual applications. See 15 C.F.R. Pt. 371 (1988). For example, under general license GLV, goods whose value is below a specified dollar amount may be exported to almost all countries in the world. 15 C.F.R. 371.5 (1988). The focus of this case is on the portion of the Control List which in 1976 and 1977 specified goods for which a validated export license—*i.e.*, a license for a particular shipment based upon individualized consideration of an application by the exporter—was required for exportations to the countries to which petitioners' mirrors were sent.

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period relevant to this case, the regulations required a validated license for exportations, other than to Canada, of specified lasers and laser parts. The pertinent portion of the Control List included "lasers, n.e.c., [with the exception of specified types of lasers whose characteristics were set out in detail] and specially designed parts and accessories, n.e.c." (Pet. App. 32a). One of the exceptions made it unnecessary to obtain a validated license for "CO_2 lasers" with, among other characteristics, "an average or continuous wave maximum rated output power not exceeding 1,200 watts" (*ibid.*). Thus, a validated license was required for CO_2 lasers whose maximum rated output power exceeded that threshold and for component parts for such lasers.

Under 50 U.S.C. App. 2405(a)-(b) (1976), it was a criminal offense to "to knowingly violate[ ] any provision of [the] Act * * * or any regulation, order, or license issued thereunder." The penalties were enhanced when a violation was committed "willfully" and "with knowledge that such exports [would] be used for the benefit of any Communist-dominated nation." 50 U.S.C. App. 2405(b) (1976).

2. The evidence at trial—which is summarized in the court of appeals' opinion in petitioners' direct appeal and our brief in opposition to the prior petition for certiorari (No. 82-1280)—showed that petitioners manufactured high quality laser mirrors. Their client list included universities, industrial users, defense subcontractors, and this country's defense agencies. 685 F.2d at 1079.

In 1974, petitioners established a relationship with a German businessman, Wolfgang Weber, in order to market their products in Central and Eastern European nations. Spawr Optical's general manager attended a conference on the Commerce Department's export regulations, and he and Walter Spawr received and reviewed the

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Department's then-current Control List. Under the regulations then in effect, a validated license was required for any exportation to country group "Y," which included the Soviet Union, of lasers and laser components not falling within a specified exception; a validated license was also required for exportations to country group "V," which included Switzerland and West Germany, unless the export was valued at $500 or less. 685 F.2d at 1079; 82-1280 U.S. Br. in Opp. at 4.

In October 1975, Walter Spawr provided Weber with sample mirrors to exhibit at a trade show in Moscow. In January 1976, petitioners authorized Weber to accept an order for laser mirrors from a purchasing agency for the Soviet government. Petitioners delivered some of the mirrors to Weber when he visited California; they shipped the remainder to West Germany. In the shipping documents for the order, Frances Spawr falsely listed the value of each laser as $500.[3] Weber forwarded the entire order to the Soviet Union. 685 F.2d at 1079.

Later in 1976, petitioners received a second order for laser mirrors from the Soviet Union. Walter Spawr applied to the Commerce Department for a validated export license for 14 of the 29 mirrors covered by the order. 82-1280 U.S. Br. in Opp. at 5. On October 7, 1976, the Commerce Department denied the application "for national security reasons" (*id.* at 6). It found (*ibid.*):

> These laser mirrors * * * had significant strategic applications. [The license applications] have been denied in view of the predominant use with CO_2 lasers, which have important applications in the

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[3] A former employee of Spawr Optical testified that Frances Spawr directed her to undervalue the laser mirrors on the shipping documents "so that we wouldn't be required to have an export license." 82-1280 U.S. Br. in Opp. at 5 n.3.

> military arena * * *. [E]xports of such * * * commodities to Eastern European destinations could contribute significantly to the military capabilities as to constitute a potential threat to our national security.

Petitioners had a right to an administrative appeal of that determination (15 C.F.R. 389.2 (1977)), but did not pursue one. See Tr. 668-670. Rather, they shipped the mirrors to Switzerland, again using shipping documents that falsely stated that the value of each mirror was $500 or less. Upon receiving the mirrors, Weber relabelled the boxes and shipped them to Moscow. 685 F.2d at 1079.[4]

At trial, the government introduced expert testimony that both orders consisted of water-cooled laser mirrors designed for CO_2 lasers rated at greater than 1200 watts. *E.g.*, Tr. 1013-1014, 1041-1047, 1126-1127, 1936-1952; see Tr. 1056-1058, 1081-1090, 1100-1102. In its final jury charge, the trial court read verbatim the relevant portion of the Control List and the regulation prohibiting exportations of commodities on the list without a license, along with other pertinent statutory provisions. Tr. 2313-2319. The instructions continued (Tr. 2319):

> In order to establish the offenses charged in counts seven through nine and eleven through fourteen of the indictment [the exportation without a license counts], the United States must prove beyond a reasonable doubt three essential elements:

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[4] When the application was made, Frances Spawr told an employee that she did not expect the Commerce Department to approve it because the laser mirrors were "going to Russia," but that they would "still send the mirrors" even if the application were disapproved. After the Commerce Department denied petitioners' application, Frances Spawr told the employee that they would "still sell the mirrors to Russia" by "using some address in Switzerland." 82-1280 U.S. Br. in Opp. at 5-6 n.5.

> First, that on the dates charged in the respective counts, the defendant willfully exported water-cooled copper laser mirrors from the United States to a foreign country;
>
> Second, that the defendant made these exports with the knowledge that the laser mirrors would be used for the benefit of a Communist dominated country; and,
>
> Third, that in the course of each export, an applicable governmental export control licensing regulation was violated.

The jury found the corporation guilty on the substantive counts arising from the first order, and all three petitioners guilty of the count alleging conspiracy to violate the export regulations and the substantive counts arising from the second order. See 685 F.2d at 1078 n.1.

3. a. The present case arises from petitioners' 1985 motion to vacate their sentences under 28 U.S.C. 2255. The motion asserted ten grounds, none of which had been raised at trial or on direct appeal from the convictions. *United States* v. *Spawr Optical Research, Inc.*, No. CV 85-3193-WMB (C.D. Cal. Oct. 9, 1986), slip op. 2.[5] Petitioners contended, *inter alia,* that their trial attorneys had provided ineffective assistance of counsel and that the prosecution had withheld exculpatory evidence. *Ibid.*

The court rejected petitioners' contention that their trial attorneys had provided ineffective assistance of counsel "in light of the overwhelming evidence of guilt at trial." *Spawr Optical Research, Inc.* v. *United States,* slip op. 9. Further, applying the "cause" and "prejudice" test outlined in *United States* v. *Frady,* 456 U.S. 152 (1982), the court found that any alleged inadequacy did not constitute

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[5] The district court's opinion was not included in petitioners' appendix. We have lodged ten copies of the opinion with the Clerk.

"cause" excusing petitioners' failure to raise the grounds asserted in the Section 2255 motion at trial or on direct appeal. The court observed that "[t]here is little merit to the Spawrs' contentions, and their counsels' failure to raise these issues at trial or on appeal reflects more this lack of merit than it does any negligence on the part of counsel." Slip op. 6-7, 10. Finally, the court concluded that petitioners had not been prejudiced by any of the errors raised in their motion. Addressing each of those claims in turn, the district court determined that each was without merit. *Id.* at 10-17.

b. In a motion for reconsideration of that decision and in a supplemental motion, petitioners raised for the first time the claims that are the subject of the petition. They argued, *inter alia,* (i) that their trial counsel had failed to present expert testimony that petitioners' lasers were not on the Control List and to depose prosecution witnesses on that issue; (ii) that the prosecutor had withheld the information he obtained from potential government witnesses that the Spawr mirrors were not on the list; (iii) that the prosecutor had supplied the trial court with an incorrect version of the Control List, thereby misleading the court and the jury; and (iv) that the government had withheld a document authored by a witness that established, as petitioners construed it, that equivalent lasers were available in Switzerland. See Pet. App. 21a-25a.

The district court rejected these contentions. It first renewed its finding that defense counsel's representation at trial was "not so * * * inadequate that [petitioners] have shown 'cause' to raise these issues collaterally." Pet. App. 22a. The court also found, in the alternative, that defense counsel's alleged failure to develop expert testimony on the question whether petitioners' lasers were or should have been on the Control List, and any withholding of information on that question, did not prejudice petitioners. *Id.* at

22a, 24a. Observing that "the executive branch determines which items or information must be regulated to effectuate the many domestic and international policies enumerated in the Act," the court stated that it had made a determination, based on expert testimony, that the lasers were on the list. *Id.* at 22a; see *id.* at 24a. The court continued, "Whether the device is not on the List, or should be on the List, were not questions that went to the jury." *Id.* at 22a. Thus, the court continued, the expert testimony petitioners believed their trial counsel should have offered "would have had no appreciable effect on the outcome of the case" (*ibid.*), and the evidence allegedly withheld by the prosecutor could not be considered exculpatory (*id.* at 24a).

Finally, the district court rejected the contention that the prosecutor had submitted the wrong version of the Control List in response to the court's request at trial. Based on its review of the transcript and the lists in question, the court recalled "that the prosecution submitted both lists," and it concluded that it "did have the correct List before it." Pet. App. 25a.

4. On appeal, petitioners renewed the contentions they had first raised in their Section 2255 motion for reconsideration and supplemental motion. The court of appeals affirmed, with Judge Pregerson dissenting (Pet. App. 1a-16a).

The majority concluded that none of the alleged trial defects was material. It observed that all of petitioners' claims of prosecutorial misconduct and ineffective assistance of counsel related to the issue whether petitioners' lasers were included on the portion of the Control List for which a validated license was required. Pet. App. 10a. The majority noted that the Secretary of Commerce had been designated "the coordinating official in the area of export administration," and stated that "[i]t would severely un-

dermine the Secretary's authority if judges and juries in individual criminal proceedings were permitted to reverse licensing determinations." *Id.* at 11a-12a. Observing that the statute prohibited violations of not only "the particular statute or its regulations, but also any license or order issued thereunder," the majority concluded (*id.* at 12a-13a):

> In this case, the Secretary has determined that [petitioners'] mirrors could not be exported without an export license. Right or wrong, the trial court must accept this determination as a matter of law. The government need not establish independently at trial, as an element of the charged offenses beyond a reasonable doubt, that [petitioners'] mirrors were included on the CCL and therefore subject to the licensing requirement. Because the licensing issue was not an element of the charged offenses, [petitioners] are not denied due process or the right to a jury trial by deference to the Secretary's determination. Rather, given the Secretary's determination, the prosecution must prove only that [petitioners] exported their mirrors without the necessary license and with the appropriate mental state.[6]

Judge Pregerson dissented. Pet. App. 13a-16a. He agreed with the majority that "the Secretary of Commerce's decision to place a commodity on the Commodity Control List * * * is not subject to judicial review." *Id.* at 13a. In his view, however, an essential element of the charged offenses was that petitioners' lasers

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[6] The majority noted that the trial court had heard testimony and instructed the jury with respect to the Control List. But it determined that because "the need for an export license had already been established conclusively by the Secretary," it was "harmless to place this issue before the jury." Pet. App. 13a.

were in fact on the Control List at the time they were exported. He concluded that "[i]t was for the jury, not the Secretary of Commerce, to determine whether [petitioners'] laser mirrors were in fact an item listed on the CCL." *Id.* at 16a.

ARGUMENT

We do not subscribe entirely to the reasoning of the majority of the court of appeals. However, the court's conclusion is correct: none of the evidence that petitioners now assert that their trial counsel should have introduced, or that the prosecutor allegedly withheld, was material or admissible. Accordingly, further review is not warranted.

1. The theory of the prosecution on the counts relevant to the petition was that petitioners had conspired to violate, and had violated, an export control regulation that prohibited exportation without a validated license of goods for which such a license was required.[7] Accordingly, the government was required to prove that the laser mirrors that petitioners exported to the Soviet Union were included within the portion of the Commodity Control List that specified the commodities to which the validated licensing requirement applied.

The relevant Control List did not attempt to list each individual laser component for which an export license was required. Rather, the list included all "lasers" with specified exceptions and "specially designed parts and acces-

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[7] This regulation, 15 C.F.R. 372.1(b) (1988), stated:

> No commodity or technical data subject to the Export Administration Regulations [*i.e.*, on the Control List] may be exported to any destination without a validated license issued by the Office of Export Administration, except where the export is authorized by a general license or other authorization by the Office of Export Administration.

sories." Pet. App. 32a. To prove that the particular laser mirrors petitioners had exported were within this category, the government put on expert testimony that those mirrors were designed for use with CO_2 lasers whose output exceeded 1200 watts, the maximum allowed by the exception for lasers of that type. In its instructions, the court read the language of the Control List to the jury. Thus, the jury's guilty verdicts necessarily reflected its findings that petitioners' laser mirrors were laser components for which a validated license was required.

Petitioners now contend that their trial counsel should have presented evidence that the laser mirrors were not "on" the Control List—and that the government withheld exculpatory evidence on that issue. Notably, however, the record does not reflect that any of that evidence relates to the *factual* issue framed by the Control List—which is whether petitioners' laser mirrors were designed for CO_2 lasers whose characteristics made them subject to the validated licensing requirement. Rather, that evidence would relate only to the issues of how the pertinent portion of the list was understood by persons who had participated in its drafting and whether, in view of the nature of the laser mirrors' potential military and civilian applications, the list should be interpreted to include them. No evidence of that type would have been admissible at trial. Accordingly, trial counsel cannot be faulted for failing to offer it, and even if the prosecution had withheld information of that type—a contention not sustained by the record—that information would not have been exculpatory or material.

In the court of appeals and this Court, petitioners have argued that their rights were violated by (a) the prosecution's alleged suppression of evidence from two potential expert witnesses, Alan Hill and Theodore Saito, who, according to petitioners, would have testified that petitioners' lasers were not on the Control List (Pet. C.A. Br.

7-8, 13; Pet. C.A. E.R. 98-107); (b) trial counsel's allegedly negligent failure to question defense expert witness Dr. Peter Franken concerning his understanding of the list – or to depose or serve interrogatories upon government witnesses regarding their views (Pet. C.A. Br. 8; Pet. C.A. E.R. 108-111; see Pet. 4, 23); (c) the alleged suppression of a document said to establish that petitioners' lasers could not lawfully be included on the Control List (Pet. C.A. Br. 29-33; Pet. 24); and (d) the prosecutor's submission of a so-called "bogus list instead of the authentic CCL," allegedly for the purpose of intentionally misleading the trial court (Pet. 4; see Pet. C.A. Br. 4). None of these contentions furnishes the slightest basis for disturbing petitioners' convictions.

a. Dr. Hill's declaration (Pet. App. 44a-45a) does not state that petitioners' mirrors were not designed for use with CO_2 lasers whose output exceeded 1200 watts. The declaration therefore does not address the question whether petitioners' mirrors are within the category, defined by the Control List, for which a validated license was required. Rather, Dr. Hill's declaration is directed to a quite different point. Based upon Dr. Hill's asserted role in drafting the Control List, the declaration provides his understanding of the types of technology that the list was intended to include. According to the declaration, the laser entry covered only "items that have, or can be adapted to have, or can be redesigned and up-scaled to have, weapons grade capability" and "would apply only to the so called 'advance gas flow' technology used to generate a laser beam, but not specifically to the mirrors manufactured and exported by Walter Spawr." *Id.* at 45a. The Spawr mirrors were not "specifically" covered, the declaration continues, because "SPAWR equipment was not an advanced technology laser mirror capable of reflecting a laser beam, at the high power levels required for

possible laser weapons applications * * * and * * * the items in question did not have, nor could they be adapted to have, or be redesigned and up-scaled to have, weapons grade capability." *Ibid.*[8]

Testimony of this type would have been inadmissible at trial, since it did not address the issue of fact framed by the Control List—which was whether the laser mirrors were designed for CO_2 lasers whose maximum power exceeded 1200 watts. Whether or not the relevant entry on the Control List should be interpreted to cover only technologies with military applications—or only gas flow technologies—was not an issue of fact on which evidence could be received. As the court of appeals noted, the Secretary of Commerce has been designated "as the coordinating official in the area of export administration" (Pet. App. 11a), and the statute under which the Control List was promulgated "excluded" his functions from judicial review (50 U.S.C. App. 2407 (1976)). Accordingly, the court would not have been entitled to admit testimony on any understanding that private consultants may have entertained as to the intended scope of the list, any more than it could have heard testimony from staff per-

[8] In assessing Dr. Hill's declaration, it is helpful to recall that the application of the validated licensing requirement to a particular item does not mean that the item can never be exported. Rather, when an item that is to be exported appears on a portion of the List requiring a validated license, the proposed exportation is subject to individualized consideration that may result in issuance of a validated license. Moreover, Dr. Hill's testimony concerning petitioners' laser mirrors would have been in direct conflict with the judgment of officials, whose decisions Congress excluded from judicial review, who considered petitioners' license application. Petitioners' application for a license was denied based upon a finding that their laser mirrors "had significant strategic applications" and that exports to Communist nations "could contribute significantly to [their] military capabilities [and thus] constitute a potential threat to our national security." See p. 5, *supra*.

sons who participated in drafting the Act as to their view of the purpose of the legislation.

The language of the list drew no distinction between " 'advance gas flow' technology" and other technologies, nor was it limited to lasers that experts might describe as having weapons capabilities.[9] The testimony outlined in Dr. Hill's declaration thus provides no basis for relief from petitioners' convictions.[10]

b. The allegedly negligent failure of petitioners' trial counsel to elicit expert testimony on the technologies that the Control List was intended to encompass was immaterial for the same reason. In the court of appeals, peti-

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[9] In this case, of course, there has been and can be no claim that the Secretary's interpretation of the Control List was unforeseeable or that the list failed to give fair notice of what acts were forbidden. Petitioners applied for a license, and their elaborate attempts to conceal the value and ultimate destination of their exportations reflected their awareness of the applicability of export controls. The jury was instructed in terms of the express language of the Control List.

To underscore the immateriality of Dr. Hill's proffered testimony, it is helpful to examine the impact on the trial of the admission of that testimony. If Dr. Hill were allowed to testify as to the intention of his recommendation, the government would have been no less entitled to respond with testimony concerning the intention of those persons who were responsible for the promulgation of the Control List. Testimony of that type clearly would not have presented an issue of fact for the jury.

[10] Petitioners' court of appeals brief also argued that the prosecutor "suppressed" the testimony of Col. Theodore Saito. Pet. C.A. Br. 11. Col. Saito's declaration (Pet. C.A. E.R. 104) states that he was interviewed by petitioner Walter Spawr, and agreed to testify at trial, but that he was not interviewed by Spawr's counsel or called as a witness. The declaration provides no information whatever concerning the nature of any alleged government "suppression" or the substance of the testimony that Col. Saito would have provided. Nothing in the Saito declaration casts any doubt on the validity of petitioners' convictions.

tioners relied on a declaration from Dr. Peter Franken (Pet. C.A. E.R. 109-110), who testified as a defense expert. In substance, Dr. Franken's declaration tracks Dr. Hill's declaration. The declaration asserts that Dr. Franken consulted with the Department of Commerce regarding whether "various optical devices should be placed on the Commodity Control List." "[T]he equipment manufactured by Walter Spawr was not and should not have been on the Commodity Control List," the declaration continues, since the "pertinent regulations restricting export of certain laser equipment would apply to the so-called 'advance gas flow technology' used to generate a laser beam, but not to the equipment manufactured and exported by Walter Spawr." *Ibid.* Like Dr. Hill's declaration, this proffer does not state that the Spawr mirrors exported to the Soviet Union were not designed for CO_2 lasers whose power exceeded the threshold prescribed in the Control List. Rather, the basis for the assertion that equipment manufactured by petitioners "was not on the list" was Franken's interpretation of the Control List—*i.e.*, his understanding that the list would apply only to "advance gas flow technology," a limitation nowhere mentioned in the list itself. A jury cannot be allowed to determine issues as to the legal effect of a regulation, based upon testimony by private consultants approached in connection with its drafting.

Petitioners' contention that their trial counsel was negligent in failing to depose government witnesses or to serve interrogatories (Pet. 4, 23) is groundless. Those discovery devices are generally unavailable in criminal proceedings, and it would have been clear error for the trial court to permit inquiries designed to probe the Secretary's understanding of the relevant portion of the Control List.

In short, none of the alleged negligence argued to the court of appeals and reasserted in this Court could have

had any effect whatever on petitioners' trial. Petitioners' ineffective assistance claim provides no basis for collateral relief.

c. Petitioners' next contention is that the prosecution withheld a document which, in petitioners' view, establishes that their laser mirrors could not lawfully have been included on the portion of the Control List for which a validated license was required. See Pet. App. 42a-43a. That contention fails for several alternative reasons.

At the outset, petitioners' argument rests on a serious distortion of the contents of the document. It was not, as petitioners contend, a document "in which the Secretary, through the Office of Export Administration" (Pet. 8), made a finding as to the availability of laser mirrors from Swiss producers. See also Pet. 24. Rather, it was a part of a *recommended* disposition of petitioners' application for a license.[11] Ultimately, those with final authority to pass on petitioners' application decided not to grant a license. Petitioners' effort to attribute the document to the Secretary is therefore groundless.

Second, the document's discussion was not directed to the question whether mirrors equivalent to petitioners' mirrors were "available" in the sense required to eliminate

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[11] The appendix to the petition (Pet. App. 42a-43a) reproduces only a portion of the document (pp. 2-3 of the original). The first page of the original is a cover sheet entitled "Referral of Export Application to Policy Planning Division." It refers to the attachment – the document reproduced in the appendix – as an "OC draft document" accompanying a recommendation for approval of petitioners' application for a license. "OC" is a reference to the Operating Committee, an interagency committee including, among others, representatives of the Defense Department. The Operating Committee is consulted with respect to exportations to certain destinations, including the Soviet Union. It considers whether the stated end use of the export is consistent with the Act's policies and whether the export can be diverted to military use.

the validated licensing requirement. Its focus was on whether the particular shipment should be authorized, not on the broader question whether the commodity should be reclassified.

Finally, during the relevant period, a finding of availability did not automatically require reclassification. The Secretary was empowered, under 50 U.S.C. App. 2403(b)(1) (1976), to curtail exports to "any nation or combination of nations threatening the national security of the United States if [he] determines that their export would prove detrimental to the national security of the United States, *regardless of their availability from*" other nations, as long as that determination was reported to Congress (emphasis added). The Secretary was not obligated to withdraw the validated license requirement from particular goods unless he determined that they were "available without restriction in significant quantities and comparable in quality to those produced in the United States," and even then controls could be continued if it were determined "that adequate evidence [had] been presented * * * demonstrating that the absence of such a control would prove detrimental to the national security of the United States." 50 U.S.C. App. 2403(b)(2) (1976).[12]

The correctness of the Executive Branch's actions under these provisions was not subject to judicial review, and plainly could not have been tried to the jury at petitioners' trial. Accordingly, the draft recommendation's statement that comparable mirrors were available in Switzerland raised no triable issue. It was therefore not exculpatory or material within the meaning of *Brady* v. *Maryland,* 373 U.S. 83 (1963), and its progeny.

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[12] We note that the foreign availability provisions of the Act have been amended several times since 1977. See, *e.g.,* 50 U.S.C. App. 2403(c), 2404(f), 2405(h) (1982 & Supp. V 1987). Accordingly, the correctness of petitioners' interpretation of the 1969 Act has no continuing importance.

Indeed, the Product Division's draft recommendation found that petitioners' laser mirrors were on the pertinent portion of the Control List. It noted that although those mirrors "are used primarily with CO_2 lasers with CW power levels of approximately 200 watts," "[t]hey can and are being used with CO_2 lasers with power levels exceeding 1200 watts" and that "[i]t is not possible without knowing the specifics about the laser with which these mirrors are utilized, to determine the maximum level at which they can operate." Pet. App. 42a. The draft recommendation concluded (*id.* at 43a):

> These mirrors are covered under IL-1522 [the Control List] since they are components for lasers which have not been specifically excluded. Although they are not specially designed for lasers and are used with other light sources, their predominant usage is with CO_2 lasers and, therefore, covered by IL-15222 [*sic*].

d. Petitioners argue that the prosecutor "knowingly provided the judge and jury with a bogus list instead of the authentic CCL." Pet. 4. This assertion is meritless. During a colloquy, apparently outside the jury's presence, regarding the portion of the statute that requires a "benefit" to a Communist nation for the enhanced penalty prescribed by 50 U.S.C. App. 2405(b) (1976), the prosecutor provided the trial court with a list of "general industrial equipment" whose exportation was prohibited to countries in groups S and Z (Libya, Cuba, Kampuchea, North Korea, and Vietnam). Pet. C.A. E.R. 113-118. See Pet. App. 33a-38a. The prosecutor tendered the industrial equipment list in response to the court's request for "the commodity control list, the full list"—*i.e.*, one showing "various commodities other than lasers" (Pet. C.A. E.R. 113). Although the

the court's request was not entirely clear,[13] any confusion was demonstrably immaterial.

In the Section 2255 proceeding, the district court recalled being provided with both lists. Pet. App. 25a. In keeping with the court's recollection, the record reflects that the jury instructions incorporated the language of the portion of the Control List that related to lasers, not the industrial equipment list. Pet. C.A. E.R. 88-90. Petitioners have never contended in this proceeding that those jury instructions were erroneous in any respect, or that the submission of the industrial equipment list had any effect upon the trial. Thus, petitioners' charge that the prosecutor intentionally misled the trial court and the jury is wholly unsupported.

2. We do not subscribe to that portion of the court of appeals' reasoning which suggests that illegal exportation cases can never involve an issue of fact as to whether a validated license is required for a particular commodity. Pet. App. 11a-13a.[14] If, for instance, petitioners had offered evidence that their mirrors were designed for telescopes, and could not be used with powerful CO_2 lasers, it would have been error to exclude that evidence or to withdraw the resulting question of fact from the jury.

Nevertheless, for all of the reasons stated by the majority, courts are not justified in allowed juries to reconsider judgments that the Act commits to the Executive Branch. It is not proper, under the guise of determining whether an item is "on the list," to admit evidence of what persons

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[13] As noted above, the "full" Commodity Control List does include the goods on the general equipment list. See p. 3 note 2, *supra*. However, in the context involved, the court's request seems to have referred to a different portion of the List.

[14] We emphasize that petitioners were tried on the theory that they violated applicable regulations.

who have participated in drafting the list understood it to mean, whether particular exports have strategic or non-strategic uses and the relative importance of each, and whether items available from foreign sources make it inappropriate to control exports of similar technology from this country. The government cannot be required to present evidence to support the judgments it has made on those issues, and defendants cannot be allowed to contradict them. The record reflects that petitioners' complaints with their trial counsel—and their attack on the prosecution—are based on the premise that those issues were open to litigation at their trial. Although the court of appeals may have overstated the nature of the issues on which the Secretary's determination is conclusive, its analysis fully supports the narrower proposition that disposes of this case, which is that the particular issues petitioners seek to raise would intrude on judgments reserved for the Secretary.

A determination that those issues could not properly have been litigated at petitioners' trial would not conflict with any decisions of this Court. In *United States* v. *Mendoza-Lopez,* 481 U.S. 828 (1987), the Court held that a conviction for entering the country after being deported could not constitutionally be based on a deportation order that resulted from a fundamentally unfair deportation proceeding. The Court stated that "where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense." *Id.* at 838. The Court declined to reach the broader question whether violation of a regulation may be punished when Congress has foreclosed judicial review of the legitimacy of the regulation. *Id.* at 838 n.15. In any event, nothing in *Mendoza-Lopez* suggests that a per-

son cannot be prosecuted for exporting a commodity without a license unless a court reviews the policy considerations on which the Executive Branch has relied in classifying an item on the Control List.

In sum, petitioners' contentions in this case are far removed from those of the respondents in *Mendoza-Lopez*. In this case, petitioners are not seeking judicial review to compensate for any inadequacy in prior adjudicatory proceedings. Indeed, petitioners chose not to seek administrative review of the denial of their application for a license, even though that form of review was available to them. Moreover, they do not seek judicial review in the ordinary sense—review by a judge, giving appropriate deference to an agency's action. Rather, they are claiming that the issues they now seek to raise should have been tried to the jury. Nothing in *Mendoza-Lopez* supports that view.[15]

Excluding evidence of the type petitioners argue should have been presented in their trial would not have deprived

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[15] The lower court decisions on which petitioners rely provide no support for further review. *United States* v. *Gregg*, 829 F.2d 1430, 1437 (8th Cir. 1987), cert. denied, 108 S. Ct. 1994 (1988), and *United States* v. *Moller-Butcher*, 560 F. Supp. 550, 552-553 (D. Mass. 1983), held, consistent with our view, that the prosecution cannot be required to prove the correctness of judgments underlying inclusion of an item on the Control List as an element of the offense of exporting without a license. Though *United States* v. *Mandel*, 696 F. Supp. 505, 511-514 (E.D. Cal. 1988), suggests that a court should conduct a limited review of the Secretary's determination that a commodity is not available abroad, that conclusion was based on an analysis of statutory provisions passed after the period relevant to petitioners' case. We believe *Mandel* was wrongly decided, and it is presently on appeal to the Ninth Circuit. In any event, however, this Court ordinarily does not hear cases to resolve conflicts involving decisions by district courts.

Dart v. *United States*, 848 F.2d 217 (D.C. Cir. 1988), is completely inapposite. It involved the issue whether a court could review a civil penalty imposed by the Secretary upon his review of an administrative law judge's determination in an exporter's favor.

them of a jury's determination on an issue of fact. See *In re Winship,* 397 U.S. 358 (1970); *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975); *Carella* v. *California,* No. 87-6997 (June 15, 1989) (per curiam). The evidence that is now the basis of the Section 2255 proceeding was not relevant to the issue of fact framed by the regulations—whether petitioners' laser mirrors were designed for CO_2 lasers whose output exceeded 1200 watts. Evidence on that issue was presented to the jury, and the court's instructions left to the jury the question whether the language of the Control List included petitioners' lasers. "[T]he constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order." *Cox* v. *United States,* 332 U.S. 442, 453 (1947).[16]

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[16] In *Cox,* Jehovah's Witnesses argued, in prosecutions for being absent without leave, that their draft boards had incorrectly classified them. Relying on *Estep* v. *United States,* 327 U.S. 114 (1946), which held that the relevant statute could not be construed to exclude all judicial review of such draft board decisions, the Court noted in *Cox* that the defense could be raised. 332 U.S. at 453. However, it rejected the proposition that the issue should be submitted to the jury, holding that such a claim was subject only to review by the court to determine if there was any "basis in fact for the classification." *Ibid.* It explained (*ibid.*):

> Although we held in *Estep* that Congress did not intend to cut off all judicial review of a selective service order, petitioners have full protection by having the issue submitted to the trial judge and the reviewing courts to determine whether there was any substantial basis for the classification order. When the judge determines that there was a basis in fact to support classification, the issue need not and should not be submitted to a jury.

Petitioners' reliance on *Estep* (Pet. 13-14) is entirely misplaced. At most, it would support an extremely deferential review by a judge of the validity of export control regulations in effect in 1976. Petitioners have not sought such review, and it could not furnish a basis for awarding them any relief.

At the trial, there was no serious issue that petitioners' mirrors fell within the category of laser parts, specified in the Control List, for which a validated license was required. The evidence that they could be used with CO_2 lasers of the requisite wattage was not seriously disputed, and petitioners' efforts to conceal their exportations by falsely valuing their mirrors and sending them to Western European countries before they were transshipped to the Soviet Union made abundantly clear petitioners' understanding that the validated license requirement applied. Petitioners were convicted on the basis of jury verdicts covering all elements of their offenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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